No. 21,902

# In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

MACMILLAN RING-FREE OIL CO., INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD


ARNOLD ORDMAN,
*General Counsel,*

DOMINICK L. MANOLI,
*Associate General Counsel,*

MARCEL MALLET-PREVOST,
*Assistant General Counsel,*

ELLIOTT MOORE,
EDWARD E. WALL,
*Attorneys,*

*National Labor Relations Board.*

INDEX

AUTHORITIES CITED

Cases:

Cases—Continued

Cases—Continued Page



Statutes:



Miscellaneous:

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## JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order (R. 19-67,

[1] Pertinent provisions of the Act are set forth in Appendix A, *infra,* pp. 46-48.

106-107),[2] issued against respondent on September 2, 1966. The Board's decision and order are reported at 160 NLRB No. 70. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Signal Hill, California, where respondent is engaged in refining and marketing petroleum products. No jurisdictional issue is presented.

## STATEMENT OF THE CASE

### I. The Board's Findings of Fact

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing to negotiate in good faith with the certified bargaining representative of its production and maintenance employees.[3] The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by denying and withholding vacation pay due four striking employees, thereby discriminating against them because they engaged in a union activity. The facts on which the Board based its findings are summarized below.

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[2] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "R. Exh." and "G.C. Exh." are to exhibits of respondent and the General Counsel, respectively.

[3] Oil, Chemical and Atomic Workers International Union, AFL-CIO and Long Beach Local No. 1-128 (hereinafter collectively referred to as the "Union").

### A. *Background—The 1960 contract*

On July 21, 1960, the International Union was certified as the exclusive bargaining agent of the Company's production and maintenance employees (R. 21; Tr. 51, G.C. Exh. 2).[4] Thereafter, on November 18, 1960, the International Union, together with Local 1-128, entered into a collective bargaining agreement with the Company (R. 21; Tr. 51, 585, G.C. Exh. 3(c)). The agreement (G.C. Exh. 3(c)), *inter alia*, provided that the Company recognized the Union as the exclusive bargaining representative of its employees in an appropriate unit (Art. I); prescribed wages, hours of work, and other terms and conditions of employment for such employees; required membership in the International as a condition of employment and provided a checkoff of union dues (Arts. III and IV); prohibited strikes, work stoppages, and lockouts for the duration of the contract subject to compliance with the terms of the contract and that employees would not be required to work "under unsafe conditions" (Art. XXV); and provided grievance and arbitration procedures (Art. XI). The contract was to remain in effect until October 31, 1961, "and from year to year thereafter" subject to prescribed notice provisions for amendment or termination; permitted each party to reopen the wage provisions by serving a prescribed 60-day written notice upon the other; and provided that the

[4] On April 7, 1961, the International Union was also certified as the exclusive bargaining agent of the Company's sales drivers and plant clericals (G.C. Exh. 2).

contract would "terminate" if no wage agreement was reached within the 60 days, unless the parties agreed to extend the contract "for a specific period for the purpose of continuing negotiations" (Art. II).

The Union reopened the wage provisions with the requisite notice in December 1960 (R. 21; Tr. 52, 580). This led to wage discussions, but no agreement was reached within the prescribed 60 days (R. 21; Tr. 580-581).[5] To avoid termination of the contract under its reopener provisions, the parties agreed to keep it in force subject to a right by either party to terminate it on 72 hours' notice (R. 21; Tr. 580-581). As of March 8, 1961, the parties were still in disagreement. On that date, the Union gave the Company the prescribed notice of termination (*ibid.*). On the evening of Friday, March 10, however, the parties agreed that a "status quo condition" would be maintained over the weekend pending a negotiating meeting scheduled for the following Monday (R. 22; Tr. 874, 577-578). That same evening, the Company "brought in additional trucks to haul out the finished products . . ." (R. 22; Tr. 579, 583). The Union took that to be a breach by the Company of the status quo commitment, and as a result, a work stoppage began instead on Friday night after about

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[5] The Company was represented by Henry W. Becker, a labor relations consultant, and management personnel (R. 21; Tr. 55, 872, 880). The Union was represented by George Cody, an official of the International, and by a committee of employees (R. 21; Tr. 54). Throughout all subsequent negotiations, Becker and Cody were the chief spokesmen for their respective sides (R. 21; Tr. 54-55, 872-873).

15 minutes' advance notice to the Company (R. 22; Tr. 603-605). According to Superintendent Bruce May, this procedure resulted in a loss of about $1000 worth of products (*ibid.*). About Monday, March 13, the parties reached agreement on a wage increase which was incorporated as an addendum to the 1960 contract (R. 22; Tr. 53, 874-875, G.C. Exh. 3(d)). That same day, the employees returned to work (R. 22; Tr. 875).

About a month later a dispute arose over the wage rate paid an employee and "two other items" not explicated in the record (R. 23; Tr. 877, 68). A strike was called for April 28, 1961, with the Company receiving about an hour's advance notice (R. 23; Tr. 580, 607). Company representative Becker reminded a business agent of the Local, Robert Brown, of the contractual prohibition of strikes and suggested the use of the grievance machinery (R. 23; Tr. 879). Brown replied that he had done what he could to defer the strike and would do so again if the Company raised the wage rate of the employee in question (*ibid.*). Becker stated that he could not agree without knowledge of the type of work the employee was performing (*ibid.*). Consequently, the strike followed shortly thereafter and continued until mid-June 1961 (R. 23-24; Tr. 608-609, 880). The parties executed a "strike settlement agreement," dated June 13, 1961, which provided, *inter alia*, that the contract of November 18, 1960, as amended, was "mutually terminated," and that the parties "meet as quickly as possible for the purpose of negotiating a new labor agreement" (R. 24; G.C. Exh. 3(e)).

Thereafter, the parties met 22 times for the discussion of contract terms prior to the commencement of a strike on September 8, 1964. In addition, there were 10 negotiating meetings during the strike, the last on April 2, 1965 (R. 24; Tr. 54).

**B. *The Company's contract proposal of July 27, 1961***

Three negotiating meetings were held on June 22 and 28 and July 20, 1961, at which the Union proposed that the parties re-adopt the 1960 contract with the addition that employees with 20 or more years of service be given a fourth week of paid vacation instead of 3 weeks allowed under the 1960 contract (R. 24-25; Tr. 63-64, 66, 312). At the fourth meeting, on July 27, 1961, the Company submitted a proposed contract (R. 25; G.C. Exh. 3(f), Tr. 63, 67, 889). The proposal included, at least in substance, 14 of the 28 articles of the 1960 contract, together with 13 articles which were almost entirely new (R. 25). The clauses retained included those which recognized the Union as bargaining representative, afforded employment rights following military service, and granted leaves of absence for sickness, jury duty, and a death in the family.[6] The benefits thus afforded were apparently available in the absence of contract, either as a matter of law or as a matter of Company practice (see G.C. Exh. 3(bb), Art. XIV, at p. 9).

The changes and deletions fell into several categories. One group modified existing provisions to the employee's detriment. These reduced the notice due

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[6] Articles I, XVII, XVIII, XIX, XX.

employees before a schedule change from 48 to 24 hours; provided shift differential pay only for work performed after 6:00 p.m., rather than 4:30 p.m.; and eliminated premium pay for straight-time work performed on an employee's scheduled day off.[7] Another group allowed the Company to take adverse personnel actions in the future. Thus, new provisions established a list of 35 "rule infractions" as "sufficient grounds" for discipline, including "immediate discharge," depending on the seriousness of the offense in the judgment of management; allowed the Company to alter or add to the list to any extent not in conflict with other terms of the contract; and vested "sole discretion" in management "to maintain discipline among its employees." [8] Others of this sort vested "sole" discretion in management to subcontract work—even though it resulted in layoffs, demotions, or reduction of work hours—and to determine relative employee qualifications in applying seniority provisions, hence, in effect, giving it absolute authority in this area.[9] Still another group directly affected the Union's status and function by eliminating the union-shop provision requiring new employees to join the Union and substituting a "maintenance of membership provision" which required only that old employees retain that membership; by eliminating the checkoff of union dues; by eliminating compensation for employees on certain union business and re-

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[7] Articles V (Sec. 5, 6) and VIII.

[8] R. 25; G.C. Exh. 3(f), Art. XV, XXV, Appendix "B."

[9] Articles XI and XIV.

stricting leaves of absence for union business; by significantly reducing the time allotted to the Union to take various grievance steps; and by requiring management approval of all material posted on the plant bulletin board provided for the Union under the 1960 agreement.[10] Finally, another group of provisions dealt with strikes. These changes, in effect, prohibited work stoppages even though the Company was in breach of the contract or was requiring employees to work under unsafe conditions; vested "sole discretion" in management to discharge or otherwise discipline employees who engaged in work stoppages; and obligated the Union to make a public declaration in the event of a "wildcat strike" that the walkout was unauthorized and that its members should cross any picket line.[11]

During bargaining, Company representative Becker offered various reasons for the Company's proposed departures from the 1960 contract provisions. He said that "irresponsibility" by the Union in calling strikes was the reason for the maintenance of membership provision in lieu of the "union shop" and checkoff clauses (R. 26; Tr. 890-891, 74); and that the "management rights" provisions would give the Company added protection in the light of "recent Supreme Court decisions" (R. 26; Tr. 103). Becker said that the Company needed the list of "rule infractions" to give it better control over the employees (R. 26; Tr. 96); asserted that the proposed reduction

[10] Articles III, X, XII, XIII.

[11] Articles XXIV and XXV.

in time allotted the Union for grievance-processing steps would result in speedier dispositions (R. 26; Tr. 85); stated that the Company sought control over the Union's bulletin board at the plant because "profane and scurrilous" material had appeared on it after the 1961 strike (R. 26-27; Tr. 93, 818-819); and expressed the view that the Company "should not" pay for time spent by employees in processing grievances (R. 27; Tr. 104). Additionally, Becker said that the provision removing all limitations on subcontracting was sought in the interest of efficient operations (R. 27; Tr. 95-96); that eliminating the payment of a shift differential to day shift employees for work after 4:30 p.m. would prevent "overtime on overtime," (R. 27; Tr. 929, 82-83); and that the altered seniority provisions would promote efficiency (R. 27; Tr. 88).

C. *The Union's contract proposal of September 19, 1962*

As of the twelfth meeting, held on September 19, 1962, the parties were in disagreement on all the departures from the 1960 contract. At this meeting, the Union proposed a contract (G.C. Exh. 3(g)) which substantially incorporated all the terms of the 1960 contract (R. 27). The few modifications included the vacation benefit previously proposed by the Union (R. 27; Tr. 80-81, 108B); an increase in the permissible amount of accumulated sick leave from 45 to 60 days (R. 27; Tr. 108C-109); the inclusion of a clause in the "Maintenance of Existing Benefits" article providing for the continuation of a pension plan with the expectation that one would

be provided (R. 27; Tr. 110, 101); a provision for 2 weeks' severance pay for employees laid off after 1 year of service (R. 27; Tr. 110); a provision for time and one-half for the sixth and seventh consecutive days of work (R. 27; Tr. 108B); and a pay scale that would increase the hourly rates then in effect by about 6 percent (R. 27; G.C. Exh. 3(g), appended list of present and proposed hourly wage rates).[12]

### D. *The rift deepens—the Company's contract proposal of October 18, 1962*

The differences between the Union and the Company over the departures in the Company's proposal of July 27, 1961, from the 1960 contract not only continued after the submission of the Union's written proposal, but were deepened by another draft of a proposed contract (G.C. Exh. 3(h)) submitted by the Company at the next meeting, held on October 18, 1962 (R. 27; Tr. 111). Most of the terms of the Company's second proposal were either identical to, or in material substance the same as, those of its first proposal. The second proposal set out with greater specificity the rights reserved to management; omitted language contained in the Company's previously proposed grievance and arbitration article that discharge or disciplinary action "shall be only for just cause"; included a provision not previously proposed that "where arbitration is sought and the

[12] In subsequent negotiations, the Union dropped its proposals for severance pay and increased sick-leave accumulation (R. 27; Tr. 100-101).

Company claims the matter is not subject to the arbitration provisions of this Agreement, then the matter of arbitrability shall first be decided by a court of law"; and substituted "open shop" provisions for the maintenance-of-membership article of the Company's first contract proposal.[13]

Either at the meeting of October 18, 1962, or the one that followed, Becker told the Union's representatives that while the Company had previously been willing to agree to "some type of union security" and had thus proposed the maintenance-of-membership clause in lieu of the 1960 union shop provisions, because of various "incidents" that had occurred in the plant in 1961 following the strike settlement agreement, management had decided that it had been "too liberal" in proposing the maintenance-of-membership provisions, and that the relevant proposal should be withdrawn to "reduce this authority of the Local over the employees" (R. 28; Tr. 893).[14]

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[13] Articles III, X, XXV.

[14] Becker testified that he received reports in July and September 1961 of incidents that occurred at the plant after the 1961 strike (R. 28; Tr. 886-887, 883). He said that he received reports that needles 2½ inches in length had been placed on an office chair usually used by Harold Dillard, then plant manager, and had caused the refinery superintendent, Bruce May, "a sharp pain" when he sat on the chair (R. 28; Tr. 884, 610, R. Exh. 9); that "somebody" had thrown "a caustic acid" in the shoes of an employee and another employee "had tar poured into his boots" (R. 28; Tr. 884); that lockers had been ransacked and pants left in lockers by non-strikers had been cut (*ibid.*); and that acid had been placed on, and had eroded, "a rope to a bosun chair" (R. 28; Tr. 612, 883-884). There is no evidence that the Union or any of its members was re-

**E. *The Union accepts a wage increase***

At the fourteenth meeting, held on January 2, 1963, the Company made a proposal to increase the wages of the unit employees by 5 percent or, in the alternative, to establish a pension (R. 29; Tr. 117, 898). The offer was submitted in writing (G.C. Exh. 3(i)). Following approval by the employees, the Union agreed to accept the 5 percent increase in the form of wages, and an accord to that effect was signed by the parties (R. 29; G.C. Exh. 3(k), Tr. 118, 783, 898). The agreed terms also provided that "wages and pensions shall not be a matter of negotiation until such future time as the Union shall open industry-wide negotiations on wages, hours, working conditions, etc., with the oil industry after settlement of its present negotiations with the oil industry" (R. 29; G.C. Exh. 3(k)).

**F. *From December 13, 1963, to May 7, 1964, the Company fails to schedule negotiation meetings—meanwhile, the Company initiates increased vacation benefits and the Union takes a strike vote***

There were five more meetings in 1963, but no agreement was reached on any of the subjects in controversy (R. 29; Tr. 122). At the last meeting in 1963, held on December 13, Cody asked Becker if he was prepared to submit a "final proposal" (R. 29; Tr. 122-123). Becker replied that he was not ready to do so at that point—that it would require

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sponsible for any of the incidents as the record does not identify any person responsible (R. 28).

some time to prepare one—but that he would communicate with the Union "right after Christmas" to arrange a meeting (R. 29; Tr. 123).

Meanwhile, on or about February 27, 1964, the Company proposed an increased vacation benefit.[15] The proposal was not made at a negotiation meeting, but by a letter from the Company to Union representative Cody with a copy to each employee in the bargaining unit (R. 30; G.C. Exh. 3(1), Tr. 124-125, 900). The letter stated that the Company was granting "all MacMillan employees" with 20 or more years of service 4 weeks of paid vacation; that unless the Company heard to the contrary, it would assume that the change in benefits met with Cody's approval; and that if he did not wish the benefit to be granted, he should advise the Company, which was willing to discuss the matter (R. 30; G.C. Exh. 3(1)). Upon receipt of the letter the following day, Cody telephoned a Company vice president, Earle Willoughby, and told him that the matter would be submitted to a meeting of employees, and that a "signed letter of agreement" would be necessary (R. 30; Tr. 126). The Company prepared such a letter on March 2, 1964, and its terms became an agreement upon execution by the International on the following day (R. 30; Tr. 126, G.C. Exh. 3(m)).

At a Union meeting in February 1964, all but one employee present voted in favor of a strike to support the Union's contract demands. The date of the strike

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[15] The proposal was similar to that proposed by the Union at the first negotiation meeting on June 22, 1961 (R. 24-25).

was left to the discretion of the negotiating committee (R. 30; Tr. 168-170, 482).

By March 18, 1964, Cody still had not heard from Becker regarding the meeting which Becker said he would arrange "right after Christmas" (R. 30). On that date, Cody wrote Willoughby and proposed that the parties enter into an agreement incorporating the terms of the 1960 contract and the additional vacation benefit (R. 30; G.C. Exh. 3(n)). Additionally, Cody requested the negotiation of a pension plan, an outline of which was enclosed (G.C. Exh. 3(o)), and requested Willoughby to communicate with him regarding arrangements for the resumption of negotiations (R. 30; G.C. Exh. 3(n)). Willoughby replied by letter of March 30, 1964, stating that the Company was endeavoring to secure information regarding the pension plan material submitted and that he would communicate with Cody to arrange for a meeting; and that in the future, matters pertaining to negotiations be taken up with Becker (R. 30; G.C. Exh. 3(p)).

By the latter part of April 1964, the Company still had not contacted the Union to arrange a meeting. Cody then called Becker and requested a meeting; Becker agreed to meet on May 7, 1964 (R. 31; Tr. 129-130).

### G. *Negotiations resume—the Union sets a strike date—the Company offers its "final proposal"*

The May 7 meeting was held as scheduled and was devoted primarily to the Union's proposal for

a pension plan. The Union described the International's current oil industry "bargaining policy" which sought an increase in economic benefits amounting to 5 percent of wages, and informed the Company that the represented employees wished to use the 5 percent for the purchase of a pension plan (R. 31; Tr. 323-324, 832-834, 904-906). A Union representative gave a detailed explanation of the proposed pension plan (R. 31; Tr. 131, 784, 907).[16] Becker said the Company would take the plan under consideration and Cody agreed to defer negotiations until after a settlement in industry-wide negotiations (R. 31; Tr. 131, 785-786, 908).

In early August, Cody called Becker to set up another negotiation meeting (R. 32; Tr. 132). A meeting was set for August 20, but Becker requested a postponement to September 2 because he had not yet received some pension material which he had requested from a firm specializing in such matters (R. 31; Tr. 910-911, 838-840). In the course of this conversation, Cody told Becker that "the [industry] pattern had not been set as yet" but that he was "quite busy in negotiations with other companies" (R. 32; Tr. 331).[17]

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[16] Becker requested a printed copy of the proposed pension plan but none had been received as of the time of the hearing (R. 31; Tr. 907).

[17] By September 2, 1964, the date set for the next meeting, such negotiations had resulted in agreement between the International and various companies to increase economic benefits of employees by an amount equal to 4½ percent of their wages (R. 33; Tr. 333-334, 490).

On the morning of September 2, 1964, shortly before the scheduled meeting which was to be the twenty-first in the contract negotiations, the Union's negotiating committee discussed the question of calling a strike (R. 33; Tr. 170-172). Cody told them that he had not yet received the Company's contract proposal promised by Becker at the December 13, 1963, meeting and that matters ought to be brought "to a head" (R. 33; Tr. 172). The committee decided to strike, beginning September 8, 1964, if no adequate progress was made in negotiations (R. 33; Tr. 172, 483-484, 540).

Shortly after the September 2 negotiation meeting opened, Becker made an economic offer which, in ultimate amount, would follow "the industry pattern" (R. 33; Tr. 135). It was disputed whether the offered 4½ percent increase was applicable solely to a pension plan, as claimed by the Union (R. 33; Tr. 144-145, 470, 490-491), or whether the amount could be applied to either a pension plan or a wage increase, as claimed by the Company (R. 33; Tr. 789, 911).[18] In any event, Becker gave Cody a printed copy of the proposed pension plan (R. 33; Tr. 135). In response to an inquiry by Cody, Becker said that the plan was the same as that turned down by the Union in 1963 (R. 33; Tr. 468, 516). After some discussion about the Union's pension proposal, Cody said that

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[18] This dispute is no longer of any particular relevance. A charge which alleged that the Company misrepresented to the employees the conduct of the Union's negotiating representatives was dismissed (R. 34-36).

the Company's proposal was not acceptable (R. 33; Tr. 516, 790).

Following the discussion about the pension plan, Cody asked Becker for the "final proposal" which the latter had promised at the December 13, 1963, meeting (R. 33; Tr. 136). Becker gave Cody a draft of a contract which, with a few relatively minor exceptions, was the same as the Company's contract proposal of October 18, 1962 (R. 33-34; Tr. 136, 790, G.C. Exh. 3(q)). After an examination of the draft, Cody said that it was as bad as, or worse than, the Company's last proposal (R. 34; Tr. 516, 536-537). He told Becker that unless the parties reached an agreement by the morning of September 8, embodying a pension plan and the terms of the 1960 contract, that the Union would take "economic action" against the Company or, in other words, call a strike (R. 34; Tr. 146). At this point Becker asked Cody, "Haven't you had enough yet?" or words to that effect (R. 34; Tr. 912, 136, 335, 470, 516-517, 534, 843). Cody requested that negotiations continue, but Becker declined, stating that he had to make arrangements for the continued operation of the plant (R. 34; Tr. 136-137, 335, 470, 517, 534, 913).

On September 6, 1964, at a meeting of 25 of the 31 employees then in the unit, one of the Union's bargaining representatives read the "minutes" of the last three meetings with the Company and portions of the Company's proposed contract, reported the strike warning that had been given the Company, and answered questions "regarding the possible

strike and the negotiations" (R. 36-37; Tr. 346-347, 462, 480-482). One employee suggested another strike vote because there were two "new employees" who had not participated in the previous strike vote, but several other employees said that that was not necessary, and that the impending strike was "legal" (R. 37; Tr. 461-462). Accordingly, the strike commenced, as scheduled, on September 8, 1964, and was continuing at the time of the hearing in November 1965 (Tr. 54).

### H. *Post-strike negotiations—the Company's new strike-prohibition proposal*

On November 4, 1964, Becker wired the Union requesting a meeting to discuss putting a 4½ percent wage increase into effect (R. 37; Tr. 172-173, 349, 921, G.C. Exh. 3(u)). As a result, a meeting was held on November 6, 1964, in the presence of a Federal mediator (R. 37; Tr. 921). Becker said that the Company wished to put a 4½ percent wage increase into effect (R. 37; Tr. 174, 921). Cody indicated that the proposal was acceptable provided an agreement could be reached on the contract terms in dispute (R. 37; Tr. 174, 349, 797) and added that the Union wished to negotiate the other matters (R. 37; Tr. 921-922). Becker declined, stating that an agenda for other matters should be set up for a future meeting, but that he was only prepared to discuss the wage proposal at that time (R. 37; Tr. 179, 350-351, 922).

The negotiators next met on December 4, 1964 (R. 38; Tr. 436). By prior arrangement, the Union

submitted to the Company a list of items still in dispute (R. 38; G.C. Exh. 3(w), Tr. 429-432, 435-436). Each item on the list was discussed, but no progress toward agreement was made (R. 38; Tr. 801, 939). There was only one change of position at the meeting. Becker proposed that a paragraph be added to the strike prohibition and related requirements set forth in the Company's proposals of October 18, 1962, and September 2, 1964 (G.C. Exh. 3(x), which reads as follows:

> The Union agrees that any time a strike, work stoppage, or interruption of work or other concerted activity occurs by the employees covered hereunder during the term of this Agreement or within one (1) year from its termination, the Union shall pay each striking employee eight (8) hours per day and forty (40) hours per week at his then hourly wage rate for all the time he is on strike, including time and one-half (1½) for all hours spent picketing in excess of eight (8) hours per day and forty (40) hours per week with double (2) time for Sunday and holiday picketing.

In submitting the addition, Becker expressed the hope that it "would prevent future strikes" (R. 38; Tr. 941, 184). Cody rejected the proposal stating that he knew of no union in the United States that would agree to it (*ibid.*).

Toward the end of the December 4 meeting, Cody expressed the willingness to meet the following day or any other day or night in an effort to reach a settlement, but Becker said that he would be away

until December 18, and could not meet again until after the coming holiday period (R. 38; Tr. 182-183). Becker said that he would call Cody upon his return to arrange a meeting (R. 38; Tr. 183, 354-355, 802). On January 6, 1965 Cody wrote Becker requesting a meeting (R. 38; G.C. Exh. 3(y), Tr. 939, 189). Becker answered by letter of January 8, 1965 (G.C. Exh. 3(z)) and agreed to meet on January 12.

Meetings were held on January 12, 21, and 28, 1965, at which the parties basically reiterated views and proposals previously advanced (R. 39; Tr. 194-195).

### I. *The Union's contract proposal of March 1, 1965—the negotiations come to a fruitless end*

At a meeting held on March 1, 1965, with a Federal mediator in attendance, the Union submitted a new draft of a contract proposal (R. 39; G.C. Exh. 3(aa), Tr. 809, 991). The Union offered to agree to either the terms of the offered proposal or, in the alternative, to the terms of the Union's contract proposal of September 19, 1962 (R. 39; Tr. 200, 213-214). The new draft incorporated most of the terms of the Union's 1962 proposal, differing from the latter in that it omitted the wage reopener provisions, providing as a substitute a 3-year term with step increases for each employee totalling 22 cents an hour (R. 39; Tr. 201, 269); provided for a pension fund contribution by the Company of 15 cents per working hour for each employee affected (Tr. 201); set forth a two-step grievance and arbitration procedure patterned after a contract between MacMillan

and the Teamsters (R. 39; Tr. 209); and provided an upward revision of paid vacation benefits (R. 39; Tr. 207). Becker said that he would take the new proposal under consideration (R. 39; Tr. 200, 809).

At the next meeting, March 18, 1965, Becker rejected the Union's latest contract proposal, saying that it was substantially the same as "the old contract" and that it would increase "economic costs" for the Company (R. 39; Tr. 994, 213-214). Each article of the proposal was discussed, but the parties could not agree to any of the new terms (Tr. 994, 809), except that the Union abandoned its proposal for 60 days of sick leave and agreed to the 45-day provision previously in effect (R. 39; Tr. 211, 1009).

The final meeting was held on April 2, 1965, upon arrangements by the mediator (R. 39; Tr. 1014, 1023). No accord was reached on any of the matters in dispute, most of which had been in dispute for almost 4 years (R. 39; Tr. 215).

### J. *The Company unlawfully withholds vacation benefits from four striking employees*

Company employees Forest R. Bumgarner, Leslie E. Omo, James R. Northrop, and Stuart H. Wakefield participated in the strike which commenced on September 8, 1964 (R. 60; Tr. 441, 451, 457). As of December 1964, they had neither received vacations in 1964 nor had been given vacation pay in lieu thereof (R. 60).[19] Wakefield had been scheduled to

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[19] The vacation article of the 1960 contract provided that "newly hired employees shall, upon completion of their first

take 2 weeks' vacation beginning September 10, 1964 (R. 60; Tr. 443-444).

At the meeting of December 4, 1964, Becker was asked when the employees who had earned, but had not received, vacation pay would be paid. Becker said that he would look into the matter (R. 60; Tr. 184-185). A few days later, Cody made a similar inquiry of Willoughby and the latter assured Cody that the men would be paid what was due them (R. 60; Tr. 186-187, 353, 802-803). About a week later, Cody telephoned Willoughby about the matter. Willoughby stated that while the Company "did not deny that [the four men] had earned the vacation pay," the Company "had a policy of not paying personnel in lieu of vacation," and "felt they were not entitled to it unless they returned to work, or until they resigned from the company" (R. 60; Tr. 803, 353-354, 188).

In the latter part of 1964, Wakefield filed a complaint with the California Department of Industrial Relations seeking payment of vacation pay claimed to be due (R. 60; Tr. 449-451). At a hearing before an official of that agency, Willoughby agreed that "these vacations were due" the men, but that "the vacations would not be paid until (sic) the duration of the strike" (R. 60; Tr. 453). Shortly thereafter, on or about July 15, 1965, the Company paid each of the four men the amount each claimed to be due him as vacation pay (R. 61; Tr. 457-458).

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year's service, take their pro rata vacation pay to January 1, so that January 1 will thereafter become their vacation anniversary" (R. 60; G.C. Exh. 3(c), Art. VIII).

### II. The Board's Conclusions and Order

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing to negotiate in good faith with the certified bargaining representative of its production and maintenance employees. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by denying and withholding vacation pay due four striking employees, thereby discriminating against them because they engaged in a union activity. Additionally, the Board found that the strike that began on September 8, 1964, was caused, and has been prolonged, by the Company's unfair labor practices (R. 64).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires the Company to bargain collectively with the Union, upon request, with respect to wages, hours, and other conditions of employment, and if agreement is reached to embody it in a signed contract; to reinstate, upon unconditional request, any employee who engaged in the strike that began on September 8, 1964,who has not yet been reinstated to his former or substantially equivalent position and, in the event of refusal by the Company to reinstate any such requesting employee, to make the employee whole, with interest, for loss of pay suffered by reason of such refusal; and to post appropriate notices (R. 65).

## ARGUMENT

### I. Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(5) and (1) of the Act by Failing to Bargain in Good Faith

#### A. *The applicable standard*

Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." "To bargain collectively" is defined by Section 8(d) as "the mutual obligation * * * to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement * * *." To be sure, neither party is obligated to yield to any or all demands of the other. But "there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement * * *." *N.L.R.B.* v. *Herman Sausage Co.*, 275 F. 2d 229, 231 (C.A. 5). Indeed, as the Supreme Court said in restating the principles which guide decision in cases involving the bargaining duty imposed by the Act in *N.L.R.B.* v. *Insurance Agents' Union*, 361 U.S. 477, 485:

> Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, in which each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement to enter into a collective bargaining contract.

Similarly, this Court has stated that there exists a duty to enter into negotiations with "an unpretending, sincere intention and effort to arrive at an agreement [and] absence thereof constitutes an unfair labor practice." *N.L.R.B.* v. *Stanislaus Implement Co.*, 226 F. 2d 377, 380 (C.A. 9); *N.L.R.B.* v. *Mrs. Fay's Pies*, 341 F. 2d 489, 492 (C.A. 9); *N.L.R.B.* v. *Shannon*, 208 F. 2d 545, 548 (C.A. 9). While this duty does not require reaching an agreement, it does interdict "mere pretense at negotiation with a completely closed mind and without [a] spirit of cooperation and good faith . . . ." *N.L.R.B.* v. *Wonder State Mfg. Co.*, 344 F. 2d 210, 215 (C.A. 8); *N.L.R.B.* v. *Shannon*, *supra*, 208 F. 2d at 548.

In judging whether the parties have fulfilled their statutory duty to confer in good faith "the Board has been afforded flexibility to determine * * * whether a party's conduct at the bargaining table evidences a real desire to come into agreement." *N.L.R.B.* v. *Insurance Agents' Union*, *supra*, 361 U.S. at 498. That determination is made by "drawing inferences from the conduct of the parties as a whole." *Ibid.* It is one of "mixed fact and law, [and] a court will not lightly disregard the overall appraisal of the situation by the Labor Board 'as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.' " *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (C.A. 1), cert. denied, 346 U.S.

887, quoting *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488.

### B. *The bases for the Board's determination that the Company failed to bargain in good faith*

#### 1. *Progressive injection into the negotiations of increasingly prohibitive proposals aimed at undermining the Union's representative capability and status*

As shown in the Statement, the Union has been the exclusive bargaining agent of the Company's production and maintenance employees since July 21, 1960, and on November 18, 1960, the Union and the Company entered into a collective bargaining agreement (G.C. Exh. 3(c)). By the terms of a "strike settlement agreement" of June 13, 1961, the 1960 contract was mutually terminated (G.C. Exh. 3(e)). Subsequent negotiations spanned almost 4 years and the parties met some 30 times, but no new agreement was reached. As the Board found, one of the principal causes of this fruitless end was the Company's tactic of increasingly restrictive proposals predictably unacceptable to the Union and forseeably productive of deadlock (R. 53-54).

As shown in the Statement, the Company's first counteroffer deprived the employees of some benefits and gave management authority to make further substantial changes to the employees' detriment, including reduction in hours, layoff, or discharge. The principal example was the provision for "rules infractions" which gave the Company the right to establish virtually any rule it wished and discharge any

employee who in management's judgment "violated" the rule. Under the original proposal, it was not clear whether the Company's decision in this respect was subject to arbitration, although the contract provisions for handling the related problem of seniority on layoff (*supra*, p. 7) and the wording of the management rights' clause (*supra*, p. 7) indicated that the Company's decision would be final. Shortly afterwards, however, the Company stated that it would not arbitrate these discharges and in its 1962 proposal the provision that discharge must be for "just cause" was deleted. Cf. *Vanderbilt Products, Inc.* v. *N.L.R.B.*, 297 F. 2d 833 (C.A. 2). Similarly, the Company opened by withdrawing agreement to a "union shop," and simultaneously making several other proposals which were, in effect, attacks on the Union's status. Later, the Company went further and withdrew its offer of a "maintenance of membership" clause and insisted on an "open shop." As a third example of this conduct, the Company began by seeking to prohibit all strikes, even eliminating the provision (grounded on Section 501 of the Act, *infra*, p. 48) that employees need not work under "unsafe conditions." After "bargaining," however, the Company came forward with a proposal that the Union pay employees full salary while they were on strike during the contract period and for a year afterward, although Becker conceded that "probably" no union had ever signed "anything like this" (Tr. 941-943).[20]

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[20] Becker testified that he expressly told Cody at the meeting of January 28, 1965, that the Company had withdrawn

In short, the Company's bargaining proposals were such that they did not have "the slightest chance of acceptance by a self-respecting union. . . ." *Reed & Prince Mfg. Co., supra,* 205 F. 2d at 139; *Vanderbilt Products, supra,* 297 F. 2d at 834. The Company recognized this and sought to justify its position, but its "explanations" only make the position less tenable. The Company's assertion (Tr. 943) that the strike-pay proposal was designed "to stimulate negotiations" is incredible on its face. The Company sought to explain its progressively harsher proposals during the course of negotiations as a reasonable reaction to the Union's failure to accept the Company's original offers (Tr. 1077-1078). Significantly, however, Becker sought to justify the harshest initial proposals of all —the provisions allowing "absolute employer right to discharge or lay off without restriction or seniority limitation" (*Vanderbilt Products, supra,* 297 F. 2d at 833)—on the basis of post-strike misconduct by unidentified persons (Tr. 934). The record shows, how-

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the proposal (Tr. 968-969). But previously, when asked about the manner of withdrawal, Becker testified, "Just a mental withdrawing of it . . . (Tr. 944). Becker changed his testimony following an overnight recess (R. 56). Cody was in effect corroborated by Company Vice President Willoughby who said that the proposal was never "referred to again by the Company" after the meeting of December 4, 1964 (Tr. 831). Accordingly, Cody was credited (R. 56). It is well settled that such credibility determinations are peculiarly within the province of the Board and the Trial Examiner, and should rarely be disturbed on review. *N.L.R.B.* v. *Local 776, IATSE,* 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B.* v. *Stanislaus Implement Co., supra,* 226 F. 2d at 381.

ever, that these proposals were advanced *before* he learned of these incidents (Tr. 934, 886-887). He also sought to attribute both the withdrawal of the "union shop" and the subsequent withdrawal of the "maintenance of membership" clause to this same cause, although he elsewhere conceded that the original change was proposed *before* he learned of the incidents and the second change was proposed over a year—and six bargaining sessions—*after* he learned of them (Tr. 885-886).

In the course of the negotiations, and under direct examination, Becker gave cost factors or considerations of efficiency or operational flexibility, as the case may be, for the provisions in its contract proposal of October 18, 1962, dealing with shift differential pay, notice of schedule changes, subcontracting, leaves of absence, vacations, and premium pay for work on a day off (*supra*, pp. 7-8). But under cross-examination, Becker took the position that "all" of the provisions of the Company's 1962 contract proposal were "influenced by the Union's irresponsible conduct," enlarging on this claim when asked about particular provisions (R. 51; Tr. 1044, 1046, 1054, 1063-1065). Willoughby contradicted Becker with testimony that the only proposals of the Company influenced by union conduct were the "union shop clause" and the "strike and lockout clause" (Tr. 847-848). Moreover, at the negotiating meeting of June 12, 1962, Cody asked Plant Superintendent Smock if he could function under the terms of the old agreement. Smock obtained Becker's permission

and replied, "I not only can, I have worked under the old agreement," at which point, Becker said that he was the Company's representative and that Smock had no right to answer the question (Tr. 217). That was Smock's third negotiating meeting and his last (G.C. Exh. 3(b)). Thus, with their falsity and self-contradictions, the Company's "explanations" fail to justify conduct which on its face was the antithesis of bargaining. Moreover, this vacillation in assigning reasons for its conduct is further evidence of the Company's bad faith. "Good faith bargaining necessarily requires that claims made by either bargainer be honest claims." *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 152.

2. *The Company suddenly announces an increased vacation benefit*

The Company's bad faith is further evidenced by the manner in which it announced an added vacation benefit. As early as June 1961 the Union had proposed the added vacation benefit and the Company had taken the position that it could not afford it (Tr. 66). Almost 3 years after the initial proposal, without prior approval of the Union, the Company notified employees in the unit that it was putting the vacation benefit into effect (G.C. Exh. 3(l)).

The notification affords a revealing glimpse of the Company's attitude toward its bargaining responsibility. Not only was the announcement mailed to employees on the same day it was mailed to Cody, without prior arrangement with the Union, but there is not a word in the letter to suggest that the benefit

had been proposed by the Union. In fact, the impression left by the notice is that the added benefit was an act of grace by the Company. The announcement states that the Company "is continually striving to improve its employee program," that the benefit was "in furtherance of this policy," and that "all MacMillan employees" with the prescribed years of service would be given the added week's vacation (G.C. Exh. 3(l)). Finally, Cody was told that "should you not wish for MacMillan to grant this new employees' benefit, please advise us . . ." (*ibid.*). The fact that the added benefit was, upon Cody's request, subsequently embodied in a letter agreement (G.C. Exh. 3(m)) does not alter the underlying thrust of the "grant" and the manner of its announcement. There was little else the Union could do but agree, for it could hardly veto the "grant" of a benefit that it had been seeking for some years without incurring the displeasure of the employees. Under these circumstances, the Board reasonably found that the underlying purpose of the announcement was to project an image of the Company as the benefactor of "all" its employees, without regard to union representation, with a corresponding implication for the employees in the unit that their bargaining representative was ineffective. Commenting on almost identical employer conduct in *N.L.R.B.* v. *Generac Corp.*, 354 F. 2d 625, 628, the Seventh Circuit observed:

> This action was more than merely tactless. It evidenced a wilful and deliberate contempt for the whole plan of collective bargaining. It was

> fairly inferable that the employer, by this action, intended to humiliate the Union representatives and discredit them in the eyes of their fellow employees. It reflected on the alleged good faith of [the employer's] recognition of the Union as a bargaining agent.

See also, *Majure Transport Co.* v. *N.L.R.B.*, 198 F. 2d 735, 738 (C.A. 5); *N.L.R.B.* v. *Reed & Prince Mfg. Co., supra*, 205 F. 2d at 137-138.

3. *The Company's dilatory tactics*

The delaying tactics employed by the Company at various times throughout the negotiations is further evidence that the Company had no desire to reach agreement with the Union. When Cody asked Becker at the December 13, 1963, meeting if he was prepared to submit a "final proposal," Becker replied that he was not but that he would contact the Union right after Christmas to arrange a meeting. By March 18, 1964, Cody still had not heard from Becker regarding the promised meeting, so he wrote Company Vice-President Willoughby and requested resumption of negotiations (G.C. Exh. 3(n)). By letter of March 30, 1964, Willoughby told Cody that he would contact him to arrange a meeting as soon as the Company acquired some pension plan material (G.C. Exh. 3(p)). By the latter part of April 1964, the Company still had not contacted the Union to arrange a meeting. Cody again had to take the initiative in arranging a meeting, and he called Becker with the result that the parties finally agreed to meet. Thus, the meeting which Becker had prom-

ised to arrange "right after Christmas" was finally held on May 7, 1964, and then only upon the Union's initiative.

The "final proposal" requested by the Union at the meeting on December 13, 1963, was at last offered by the Company at the meeting on September 2, 1964, (G.C. Exh. 3(q)). The "final proposal," as it turned out, was substantially the same as the Company's 1962 proposal (G.C. Exh. 3(h)). No reason appears why it should take the Company so long to prepare a proposal which was virtually the same as a proposal previously offered. Moreover, when Cody warned of a possible strike because of the hard line taken in the Company's "final proposal," Becker replied, "Haven't you had enough yet?" (Tr. 912, 136, 335, 470, 516-517, 534, 843). It is reasonable to conclude that this was but a veiled intimation that the Company had thus far defeated the Union's efforts to conclude a new labor agreement and that more of the same was in store. It is well settled that the Act "does not permit an employer to secure . . . a dominant position at the bargaining table by means of unreasonable delay." *"M" System, Inc.*, 129 NLRB 527, 548-549. See also, *N.L.R.B.* v. *Exchange Parts Co.*, 339 F. 2d 829, 832-833 (C.A. 5); *N.L.R.B.* v. *W.R. Hall Distributor*, 341 F. 2d 359, 362 (C.A. 10); *N.L.R.B.* v. *Mrs. Fay's Pies, supra*, 341 F. 2d at 492.

4. *Summary*

As shown above, the record affords ample basis for the Board's finding that the Company did not meet its legal obligation to bargain with the Union in

good faith. The tactic employed was to keep as much of the 1960 contract as was favorable, but to propose significant changes aimed at destroying the Union's representative status. And, as time went by, the Company made new proposals even more restrictive and more objectionable to the Union. Even when the Company proposed an added benefit, as with the vacation benefit, it did so in a manner calculated to embarrass the Union and to discredit it in the eyes of the employees. Therefore, here as in *N.L.R.B.* v. *Mrs. Fay's Pies*, *supra*, 341 F. 2d at 492, the Board properly concluded that the "Company, with studied deliberation sought to subvert employee confidence in the Union's representation and determined to frustrate rather than promote, the quality of reasonably cooperative negotiation required by the law . . ." See, Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 Colum. L. Rev. 248, 258-265 (1964).[21]

### C. *The Company's unfair labor practices caused and prolonged the strike that began on September 8, 1964*

There is no doubt that the strike was caused by the employees' frustration with the lengthy, fruitless,

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[21] Before the Board, the Company argued that it was the Union that was bargaining in bad faith because of its refusal to settle for something less than the 1960 contract. But, as the Trial Examiner points out, that argument misses the mark because the Board's finding is *not* that the Company's proposals were *per se* unlawful. The determination made is that the Union was seeking agreement on a new contract while the Company's aim was to undermine the Union by frustrating the bargaining process (R. 57-58).

negotiations. In February 1964, at a meeting of unit employees, all but one employee present voted to strike in support of the Union's contract demands. The Union's negotiating committee was authorized to determine the date of the strike. On September 2, 1964, the committee decided to call a strike commencing September 8, 1964, if no adequate progress was made in negotiations. The Union had been expecting the Company's "final proposal" since December 13, 1963. When it was finally tendered on September 2, 1964, and it was apparent that the Company was offering little or nothing more than they had in 1962, Cody informed the Company of the Union's intention to strike commencing September 8, 1964. Since the Company was not meeting its statutory obligation to bargain in good faith—and since the strike was an obvious result thereof—the Board properly found that it was an unfair labor practice strike. *Mrs. Fay's Pies, Inc.*, 145 NLRB 495, 496-497, enforced, 341 F. 2d 489 (C.A. 9). Accordingly, the strikers are entitled to reinstatement upon request. *Id.* at 509-510.

Before the Board, the Company argued that certain violence, threats, and intimidation by pickets following the start of the strike suspended its obligation to bargain. There is no merit in this contention. It is true that there was much evidence adduced at the hearings concerning acts of violence following this strike (R. 40-43). Without here reciting the numerous alleged acts of misconduct, suffice it to say that not one person holding a position with the Union

was credibly linked to any of the misconduct (R. 40, n. 17). As was the case with the 1961 strike, the serious acts of misconduct were committed by persons unknown. The Company's bargaining posture was established well before the alleged incidents surrounding the strike and could not have been influenced by them (R. 58-59). Moreover, should the Company's position be accepted, "it would mean that at the very point when an industrial controversy becomes most bitter and when the collective bargaining provisions of the Act should provide a peaceful means of settlement those provisions are cast aside and the employer is permitted to engage in unrestricted violation thereof." *Reed & Prince Mfg. Co.*, 12 NLRB 944, 971, enforced, 205 F. 2d 131 (C.A. 1).

### D. *Section 10(b) of the Act is no bar to the Board's findings*

Before the Board, the Company strenuously objected to the admission of evidence concerning events that occurred more than 6 months prior to the filing of the charge with the Board.[22] The charge was filed on November 10, 1964 (G.C. Exh. 1(a)). Accordingly, all events occurring prior to May 10, 1964, would be affected by Section 10(b).

Section 10(b) was construed by the Supreme Court in *Local Lodge No. 1424, IAM* v. *N.L.R.B. (Bryan Mfg. Co.)*, 362 U.S. 411. The Supreme Court held

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[22] Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ."

that "where occurrences within the six-month limitation period in and of themselves may constitute, as a substantive matter, unfair labor practices . . . earlier events may be utilized to shed light on the true character of matters occurring within the limitations period . . ." *Bryan Mfg. Co.*, 362 U.S. at 416. Accord: *N.L.R.B.* v. *Strong*, —— F. 2d —— (C.A. 9, No. 20,762, decided July 14, 1967), 65 LRRM 3012, —— L.C. para. ——.

Here, there is ample evidence of events since May 10, 1964, upon which to base the Board's findings. The Company's proposal of September 2, 1964, when considered in the light of the previous negotiations, stands out as a beacon illuminating the Company's bargaining attitude. Not only was the proposal basically the same as that made by the Company in 1962, but the Company had delayed since December 13, 1963, on the premise that it would take time to reduce its "final proposal" to writing. Additionally, there is the Company's proposal of December 4, 1964, which would impose financial obligations on the Union in the event of an "unauthorized" strike (see p. 19, *supra*). As previously shown, this proposal was predictably inflammatory.

Although the background data in this case spans a considerable period of time, largely because of the nature of this case, the Board is entitled to consider it in evaluating what transpired within the 10(b) period. See cases cited p. 37, *supra*. Accordingly, the impact of the Company's September 2, 1964, contract proposal, and the other later events, must be considered in the light of the Company's past bar-

gaining practices. It is well settled that the Board is not required to consider events in isolation, separate and apart from reliable and probative evidence of their true meaning. *Sunshine Biscuits, Inc.*, v. *N.L.R.B.*, 274 F. 2d 738, 741 (C.A. 7).

**E.** ***The Trial Examiner's refusal to compel officials of the Federal Mediation and Conciliation Service to testify was not a denial of due process***

Federal Mediators Grant Haglund and Jules Medoff were present at six of the negotiating meetings from November 12, 1963, to January 12, 1965 (G.C. Exh. 3(b)).[23] The Company served subpenas on Haglund and Medoff, but the Trial Examiner granted the petition filed by the Federal Mediation and Conciliation Service to revoke the subpenas (Tr. 669, 636-675).

The Trial Examiner properly ruled that the mediators were protected by statutory privilege. Federal law provides that "the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." 5 U.S.C., Sec. 22, Rev. Stat., Sec. 161. Pursuant to the authority granted in 5 U.S.C., Sec. 22, the Secretary of Labor promulgated a regulation specifically prohibiting officers and employees of the Conciliation Service from testifying

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[23] They were also present at two other meetings that were not attended by Cody or Becker (R. 38; G.C. Exh. 3(b)).

in any case with respect to information coming to their knowledge in their official capacity (see *Tomlinson of High Point, Inc.*, 74 NLRB 681, 684 n. 8). The Conciliation Service subsequently was severed from the Department of Labor and the Federal Mediation and Conciliation Service was established. In so doing, however, Congress specifically provided that "such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor." 29 U.S.C., Sec. 172(d), 61 Stat. 153. The Federal Mediation and Conciliation Service has retained, in substance, the same regulation as that promulgated by the Secretary of Labor (see 29 C.F.R., Sec. 1401.5). The Trial Examiner reasonably interpreted 29 U.S.C., Sec. 172(d) as a savings clause and hence properly determined that Congress thereby intended the regulation concerning nondisclosure of information to remain effective (Tr. 665-666).[24]

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[24] It is settled law that these regulations are valid exercises of the executive power. *Touhy* v. *Ragen*, 340 U.S. 462; *Boske* v. *Comingore*, 177 U.S. 459; *Ex parte Sackett*, 74 F. 2d 922 (C.A. 9); *Fleming* v. *Barnardi*, 1 F.R.D. 624, 625 (N.D. Ohio); *Steagall* v. *Thurman*, 175 Fed. 813 (N.D. Ga.).

Effective July 4, 1967, the new "public information" section (Public Law 89-487, 80 Stat. 250, revising 5 U.S.C. 552, formerly section 3 of the Administrative Procedure Act) respecting disclosure by public officials, provides that it is not applicable, *inter alia*, to "(4) trade secrets and commercial or financial information obtained from any person and privileged or confidential . . . ." House Rept. 1497, 89th Cong., 2d Sess. p. 10, states: "This exemption would assure the confidentiality of . . . disclosures made in procedures such as the

Moreover, there is strong public policy for the regulation and, more important here, for the claim of privilege based on it. If mediators were permitted to testify about their activities, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. *Tomlinson of High Point, Inc.*, 74 NLRB 681, 685; *Int'l Furniture Co.*, 106 NLRB 127, 128 n. 2. The trust accorded mediators would, therefore, be seriously impaired. This loss of trust would be critical, for the Service may only *proffer* its good offices to the parties to an industrial dispute, and the statute creating the Service expressly provides: "The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation." See 29 U.S.C., Secs. 171-173, 61 Stat. 154. Accordingly, the confidence of the parties is the Service's principal asset, and with the impairment of that confidence, the Service's ability to foster settlement of labor disputes through the mediators' promotion of collective bargaining would likewise be impaired, thus defeating the intent of Congress in creating the agency. We submit that this is a case in which the "necessity [urged in support of the subpena] is dubious, [and] a formal claim of privilege, made under the circumstances of this case, will have to prevail." *United*

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mediation of labor-management controversies." Although this statute was not in effect at the times relevant here, Congress thus indicated that it intended to preserve the confidentiality of matters related to the Service.

*States* v. *Reynolds*, 345 U.S. 1, 11. See also, *Machin* v. *Zuckert*, 316 F. 2d 336 (C.A. D.C.); *Starr* v. *Commissioner of Internal Revenue*, 226 F. 2d 721, 723-724 (C.A. 7); *Madden* v. *Hod Carriers, etc., Local No. 41*, 277 F. 2d 688 (C.A. 7), cert. denied, 364 U.S. 863; *Kaiser Aluminum Co.* v. *United States*, 157 F. Supp. 939, 942 (Ct. Cl.). Cf. Rule 34, Federal Rules of Civil Procedure. As this Court recognized in *Harvey Aluminum (Incorporated)* v. *N.L.R.B.*, 335 F. 2d 749, 755, a valid claim of privilege justifies the Board's considering the evidence adduced without regard to what may have been excluded.

In any event, the respondent was not prejudiced in any way by the revocation of the subpenas. Of the occurrences during the six meetings attended by the mediators, only two matters of relative insignificance are in dispute. At the September 4, 1964, meeting, with mediator Jules Medoff in attendance, the parties could not agree as to the nature of an offer made by the Company at the previous meeting. The dispute concerned whether a 4½ percent increase offered by the Company was applicable only to a pension plan, as the Union representatives claimed, or whether the Union was given a choice of applying the 4½ percent increase to either a wage increase or a pension plan, as Willoughby and Becker claimed (R. 33; Tr. 144-145, 470, 490-491, 789, 911). The only significance of this dispute is its possible effect on the credibility of the parties. The Trial Examiner found that there was simply a good faith mis-

understanding (R. 35-36). It is difficult to see how respondent was prejudiced by this finding, or how the testimony of the mediator as to *his* understanding could alter the Examiner's conclusion.

At the only other meeting involved, Becker and Willoughby claimed that the Company made its "final proposal" at the December 13, 1963, meeting, the sense of their testimony being that it consisted of the Company's written proposal of October 18, 1962, with whatever changes had been made since (R. 29; Tr. 781, 903). Cody said that Becker told him that he was not yet ready to make a "final proposal," that it would take some time to prepare one, and that he would communicate with the Union "right after Chirstmas" to arrange a meeting (R. 29; Tr. 122-123). As the Trial Examiner found, if the Company in fact made its "final proposal" at that meeting, no reason appears why it should take so long to reduce to writing (Tr. 903). Thus, even assuming, *arguendo*, that the Trial Examiner erred by revoking the subpenas, the respondent was in no way prejudiced thereby. "Procedural irregularities are not *per se* prejudicial; each case must be determined on its individual facts and, if the errors are deemed to be minor and insubstantial, the administrative order should be enforced notwithstanding." *N.L.R.B.* v. *Seine and Line Fishermen's Union*, 374 F. 2d 974, 981 (C.A. 9), and cases cited therein.

**II. Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Denying and Withholding Vacation Pay From Striking Employees**

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," which includes the right to strike.[25] Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to * * * discourage membership in any labor organization," which includes discouraging participation in concerted activities.[26]

As shown in the Statement (pp. 21-22, *supra*), it is not disputed that vacation pay was withheld from four employees who participated in the strike that commenced on September 8, 1964. On two occasions, Cody checked with Company Vice-President Willoughby about the vacation pay and was assured that the men would be paid what was due them. However, Willoughby later told Cody while the Company "did not deny that [the four men] had earned the vacation pay," the Company "had a policy of not paying personnel in lieu of vacation," believing that "vacations were taken as a rest from work,"

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[25] See also Section 13 of the Act which provides that: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *."

[26] *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 233; *Radio Officers'* v. *N.L.R.B.*, 347 U.S. 17, 39-40.

and "felt the [strikers] were not entitled to [the benefit] unless they returned to work, or until they resigned from the Company" (Tr. 803). But as the Board found, this was not an accurate statement of Company policy (R. 60). It was provided in the 1960 contract that employees could receive pay in lieu of vacation (G.C. Exh. 3(c), Art. VIII), and this article was incorporated in each of the Company's subsequent contract proposals (G.C. Exh. 3(f), Art. VII; G.C. Exh. 3(h), Art. VII; G.C. Exh. 3(q), Art. VIII). Furthermore, at a hearing before the California Department of Industrial Relations, Willoughby admitted that the vacations were due but that the men would not be paid for the duration of the strike.

A recent Supreme Court case, *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 is, we submit, controlling on this point. In *Great Dane*, as here, the Company withheld vacation benefits from striking employees. The Supreme Court said, "There is little question but that the result of the company's refusal to pay vacation benefits to strikers was discrimination in its simplest form." 65 LRRM at 2468. Here, as in *Great Dane*, the Company failed to justify its action by evidence of legitimate business motives. 65 LRRM at 2469. Accordingly, the Board properly found that the Company violated Section 8(a)(3) and (1) of the Act by withholding vacation benefits from employees because they were engaged in a strike.

## CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

ARNOLD ORDMAN,
*General Counsel,*

DOMINICK L. MANOLI,
*Associate General Counsel,*

MARCEL MALLET-PREVOST,
*Assistant General Counsel,*

ELLIOTT MOORE,
EDWARD E. WALL,
*Attorneys,*

*National Labor Relations Board.*

September 1967.

### CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
*Assistant General Counsel*
*National Labor Relations Board*

## APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

### Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

### Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint

may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

* * * *

DEFINITIONS

Sec. 501. When used in this Act—

* * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

## APPENDIX B

Pursuant to Rule 18.2(f) of the Rules of the Court: (Numbers are to pages of the reporter's transcript)

### Board Case No. 21-CA-6299

GENERAL COUNSEL'S EXHIBITS

| Number | Identified | Received | Rejected | Withdrawn |
|---|---|---|---|---|
| 1(a)-1(s) | 19 | 19 | | |
| 2 | 21 | 21 | | |
| 4(a)-4(e) | 22 | 22 | | |
| 5 | 34 | 34 | | |
| 3(a)-3(aa) | 49 | 49 | | |
| 3(v) | | | | 48 |
| 3(bb) | 49 | 221 | | |
| 6 | 219 | | 222 | |
| 7 | 368 | 368 | | |
| 8 | 401 | 402 | | |
| 9 | 450 | | | 453 |
| 10 | 454 | | 457 | |
| 11(a) | 543 | 544 | | |
| 11(b) | 545 | 545 | | |
| 11(c) | 545 | 546 | | |
| 12(a)-12(b) | 547 | 548 | | |
| 13 | 1089 | 1091 | | |

## RESPONDENT'S EXHIBITS

| Number | Identified | Received | Rejected |
|---|---|---|---|
| 1-2 | 365 | 365 | |
| 3 | 561 | 562 | |
| 4 | 568 | 568 | |
| 5(a)-5(c) | 593 | | 593 |
| 6(a)-6(g) | 674 | 674 | |
| 7(a)-7(b) | 861 | 872 | |
| 8-9 | 887 | 888 | |
| 10 | 897 | 897 | |
| 11 | 989 | | |

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